

Women's rights upheld in landmark judgment on gender-based violence

As 16 Days of Activism Against Gender-Based Violence draw to a close, the Constitutional Court has sent out a unequivocal message of the judiciary's commitment to develop and implement the strongest laws to fight South Africa's scourge of gender-based violence.

By [Laura Macfarlane](#) 12 Dec 2019



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The judgment of *Tshabalala v State; Ntuli Annanius v the State CC*, handed down yesterday, 11 December 2019, takes a firm stand, which protects the values of equality, human dignity, safety and security for the women of South Africa.

The Constitutional Court heard an appeal from the High Court in August 2019 in respect of a group of men who went on a late-night reign of terror through nine plots in Umthambeka, Tembisa. The group of men forced their way into the homes on the plots where they ransacked, looted, robbed, assaulted and stabbed the occupants. They also gang raped the female occupants; in one incident raping a visibly pregnant woman and a 14-year-old girl. The attacks were found to be well orchestrated and meticulously calculated; with a preordained pattern of attack. The group was apprehended and charged. The attacks brought into focus the applicability of the doctrine of common purposes on the common law crime of rape.

Common purpose

Common purpose is the legal principle which applies to a scenario that when two or more individuals engage in a joint criminal enterprise, the principle of common purpose allows – in certain circumstances - certain acts committed by one individual in the group to be attributed to others in the group. In other words, if a group of men agree to ensure that a woman is raped, the application of one element of common purpose will allow each individual involved to be convicted of rape, regardless of who ended up perpetrating the act.

In the related matter to the Supreme Court of Appeal (SCA), which Tshabalala and Ntuli used to springbo

into the Constitutional Court, the SCA set aside all the convictions on common law rape on the basis that the appellant could not be convicted of rape on the basis of his mere presence at the rape scene. This is said to have undermined the principle of participation and liability; and because the victims were blindfolded during their gang rape, there was no evidence to prove presence at the crime. The SCA concluded that it could not establish common purpose with the rest of the gang.

Because of the SCA's findings, Tshabalala and Ntuli applied to the Constitutional Court to have their convictions overturned, on the basis that the doctrine of common purpose does not apply to common law rape. It was argued it was not possible for common purpose to apply to the crime of rape because rape could only be committed through the instrumentality of a person's own body and not through the instrumentality of another person or group of persons (the instrumentality argument).

The Commission for Gender Equality (CGE) – the Chapter Nine institution empowered by the Constitution to protect gender equality - intervened in the application because of the enormous ramifications that doing away with the principle of common purpose would have on the successful prosecution of gang rapes. The CGE, represented by Norton Rose Fulbright on a *pro bono* basis, made written and oral submissions, which provided evidence that:

1. It is in the interests of justice for the court to decide the matter as there are conflicting high court decisions in this regard and the matter raises pertinent constitutional issues linked to gender-based violence;
2. On a correct interpretation of the law as it currently stands, the doctrine of common purpose does not apply to common law rape;
3. The applicants' distinction between rape (and other crimes for which your body is instrumental) and other crimes that they concede common purpose applies is unprincipled, artificial and irrational.
4. The State has an obligation under domestic and international law to prevent gender-based violence. To carve out acts of rape and sexual assault from the doctrine of common purpose will undermine the State's ability to control these crimes in instances where they are committed by a group of individuals acting in concert.

The Constitutional Court's main judgment by Judge Rammaka Mathopo – and finding the CGE's argument on the issue helpful - held that the instrumentality argument by the applicants is flawed and that there is no reason why the use of one's body should be determinative in the case of rape but not in the case of other crimes such as murder and assault. The instrumentality argument perpetuates gender inequality and promotes discrimination.

The second judgment concurred in the main judgment by noting that rape in this country is not rare, unusual or deviant. It is structural and it would be irrational to not apply the doctrine of common purpose to the common law crime of rape.

The third judgment also concurred in the main and second judgments and noted that historically, South Africa's jurisprudence demonstrates patriarchal gender norms in the law and the acceptance of common purpose in this case marks a removal of one of the remaining obstacles to rape convictions by infusing constitutional values to common law. There are various international instruments that South Africa is a party to, which places an obligation on the State to ensure domestic laws are developed to protect women from sexual violence.

This is a landmark judgment which will have a significant impact on women's rights to bodily and

psychological integrity, freedom and security of the person and dignity and will allow for more effective prosecution of perpetrators involved in gang rape.

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